

4. The Commission Must Not Subordinate Its Debt To Private Financing

When the Commission established its auction rules, it expressly stated that the license would be conditioned "upon the full and timely performance of [their] payment obligations" and that failure to make an installment payment within 90 days of the due date could result in cancellation of the license.^{55/} Since then, the Commission has reiterated those intentions on a number of occasions, including a December 17, 1996 letter in which it emphasized that, in the case of a default, it would "declare the license cancelled and take appropriate measures under the Commission's debt collection rules and procedures."^{56/}

If the Commission were to subordinate its position to private financiers, it would eviscerate the payment obligation as a condition of the license, and threaten its ability to enforce its default and debt collection rules. The Kennard Letter clearly stated that third party financing would be subordinated to the Commission's ability to cancel and reauction the license in the event of a default. The C Block Licensees, therefore, were aware that subordination of the Commission obligation was not a possibility. All other auction winners would be placed at a

^{55/} Second Report and Order, 9 FCC Rcd 2348 (1994) at para. 240.

^{56/} Letter to Leonard J. Kennedy and Richard S. Denning, dated December 17, 1996, from William E. Kennard and Michele C. Farquhar ("Kennard Letter") at p. 2, citing Second Report and Order at p. 131.

competitive disadvantage in raising further capital, and the debt collection process would become a legal quagmire.

B. None of the C Block Licensees Provide Sufficient Justification for the Requested Relief

The bases on which many of the C Block Licensees attempt to justify the requested relief include: (a) changed financial conditions;^{57/} (b) "tremendous advantages of timing and spectrum cost enjoyed by the incumbent cellular and A- and B-Block competitors;"^{58/} (c) the Supreme Court's "unexpected" decision in Adarand;^{59/} (d) "unanticipated higher prices for C block properties;"^{60/} (e) delays in licensing C block spectrum;^{61/} and (f) "unanticipated and unprecedented intervening developments."^{62/}

Most of the events they point to are, in fact, the marketplace at work and -- more importantly -- the very same events that are impacting every other wireless communications provider -- both incumbent and new entrant. As Comcast stated, marketplace changes are irrelevant to this proceeding because "a fundamental

^{57/} See, e.g., Comments of Nextwave at p. 2.

^{58/} Comments of MCI at p. 3.

^{59/} Comments of Nextwave at p. 2; Fortunet at p. 3.

^{60/} Comments of Nextwave at p. 2.

^{61/} Comments of Nextwave at p. 2; Fortunet at p. 2.

^{62/} Comments of Nextwave at p. 17.

characteristic of markets is that they change."^{63/} The potential for such change was a known quantity, or risk, that should have been factored into their business plans and bidding strategies.

Nextwave's assertion that the Supreme Court's decision in Adarand, which delayed the start of the auction, was "unexpected," is incorrect.^{64/} The Adarand case had been on the Supreme Court's docket, and the issue of preferences and set-asides for women and minorities had been a high profile issue in previous presidential and congressional elections. Any participant entering into the C Block auction process -- with its set asides for women and minorities -- could have, and should have, factored in the risk that the law could change and thereby delay implementation of the Commission's rules. Once the case was decided, moreover, C Block participants had an opportunity to assess its impact.

Furthermore, any delays in the C Block auctions pale in comparison to delays in the licensing of competing CMRS services -- particularly 900 MHz SMR. The 900 MHz SMR allocation was made by the Commission in 1986, but initial -- or "Phase I" -- licensing was restricted to 46 "Designated Filing Areas" ("DFAs") essentially representing the largest urbanized areas of the country. All areas outside the DFAs were to be licensed in Phase II which was intended to occur between about 1988 and 1991. Phase II licensing, however,

^{63/} Comments of Comcast at p. 9. The marketplace for financing has changed very little, and as Omnipoint recognizes, is already improved. Comments of Omnipoint at pp. 4-5.

^{64/} Comments of Nextwave p. 11.

was never commenced, and 900 MHz SMR licensees were forestalled from expanding their systems into areas beyond the limits of urban markets.

In lieu of Phase II licensing, the Commission finally concluded in 1994 that 900 MHz SMRs should be licensed on an MTA basis.^{65/} Then, in 1996, ten years after the spectrum was initially allocated for SMR use, the licensing was completed in a Commission auction. The near-decade of delay in assigning 900 MHz SMR licenses stalled the deployment of 900 MHz SMR services and caused DFA licensees and potential Phase II participants to miss ten years worth of "financing windows." Yet, it should be noted, 900 MHz STA licensees have paid their auction fees and are moving forward to implement their systems.

Similarly, for the past three years, the Commission has suspended all licensing of 800 MHz SMR services. In 1993, Congress mandated that these SMR providers be provided regulatory parity by August 1994, which the Commission defined to include the geographic area licensing provided cellular and PCS.^{66/} However, the 800 MHz auction rule making was only completed two weeks ago and auctions for geographic-area licenses for the top 200 channels are tentatively scheduled for October/November 1997 -- more than three years later. The C Block licensees' claim that a year's delay is an unprecedented event justifying Commission interference with the marketplace is absurd. The Commission was extraordinarily

^{65/} Third Report and Order, 9 FCC Rcd 7988 (1994).

^{66/} See fn. 47 *supra*.

successful in expeditiously allocating the PCS spectrum, establishing service and auction rules in an intensely debated rule making proceeding, and actually granting the licenses.

IV. REALITY CHECK

To fully understand the "real" financial impact of the relief Nextwave, MCI and others are requesting from the Commission and the U.S. Treasury, we have compared the present value to the Commission of the various relief proposals to the present value of the original terms voluntarily assumed by all potential bidders in the C Block auction. In this analysis, we have discounted to the present the C Block licensees' expected payments, including down payments, interest payments and principal payments over the term of the loan. These discounts are made at rates ranging from 12 percent to 15 percent to reflect the cost of capital of these new wireless entrants (such rates are typical in the wireless industry for companies, like the C Block licensees, who are new entrants to the market). Only in evaluating Nextwave Plan B was an increased discount rate employed -- a range of 15 percent to 18 percent. This was necessary to reflect the proposed subordination of the federal government's loan to potential loans from private financiers.

Our basis for comparison is the \$10.07 billion net bid from all C Block winners, which, it is important to note, includes the small business discount provided in the Commission's auction rules. Based on the Commission's original payment terms, the net present value of the aggregate payments over the ten year term of the

\$10.07 billion loan is between \$6.5 and \$7.5 billion -- "small business" corporate welfare to the C Block licensees of \$2.5 to \$3.5 billion.

Under the relief plans proffered by the soon-to-be foreign controlled MCI, Nextwave and GWI, the net present value of the federal government's auction proceeds would be further reduced by as much as \$4.4 billion dollars, a reduction of up to \$7.9 billion of the \$10.07 billion owed the federal government. This additional multi-billion dollar "giveaway" represents a discount of up to 58% off the Commission's original terms, and as much as a 69% off the original aggregate net amount, i.e., pre-bidding credits, raised in the C Block auction. All of these reductions come at the expense of the American taxpayer, and benefit only those companies who irresponsibly bid exorbitant amounts of money for their licenses.

V. CONCLUSION


When the Commission established its PCS auction rules, businesses of varying sizes relied on them in establishing business plans and bidding strategies, and the investment community relied on those rules in investing billions of dollars. A plethora of financially significant decisions were made with the knowledge that the Commission had established its auction framework and intended to enforce it. Licensees failing to meet their obligations under those rules were told they would lose their licenses and be subject to steep penalties. Industry participants and investors had confidence in the Commission and in its rules.

A Commission decision to relieve the C Block debt will eviscerate the integrity of the auction process, leaving existing licensees, prospective bidders, and potential investors with nothing to rely upon in making business and bidding decisions. If the C Block licensees are entitled to deliverance from their financial plight, then the Commission should be prepared to provide the same relief for others. Legal entanglements will ensue for the next decade delaying service and undercutting the viability of auctions as a spectrum licensing tool.

To protect the integrity of its rules and to provide some minimum level of certainty for the industry and the investment community, the Commission must expeditiously deny the requests for relief.

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CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 8th day of July, 1997, I caused a copy of the attached Reply Comments of Nextel Communications, Inc. to be served hand delivery to the following:

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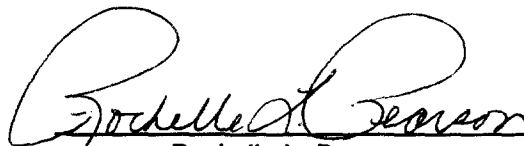
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